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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0092

IN THE MATTER OF:

T.H.,

A Youth in Need of Care.

BRIEF OF APPELLANT

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Laurie McKinnon, Presiding

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STATEMENT OF THE ISSUE

Did the district court err in terminating the parental rights of Appellant R.H. as to his child T.H.?

STATEMENT OF THE CASE

This is an appeal from the Sixth Judicial District Court's February 2, 1010, Order terminating the parental rights of R.H. to his child T.H. The parental rights of the child's natural mother, A.G., were also terminated and an appeal regarding the same is currently pending before this Court.

STATEMENT OF FACTS

On December 5, 2008, the State filed a Petition for Immediate Protection and for Adjudication of Youth in Need of Care and Temporary Legal Custody of T.H. (D.C. Doc. 2.) The Petition was based upon a referral to DPHHS alleging T.H. suffered unexplained injuries to her leg, ribs, and clavicle. On December 1, 2008, A.G. took T.H., then age four months, to the emergency room with concerns regarding T.H.'s right leg. Neither R.H. or A.G. were able to provide a satisfactory explanation for T.H.'s injuries.

A show cause hearing was held on January 6, 2009. Both parents represented they would stipulate to the adjudication. (Or. to Show Cause Hrg. Tr. at 3.) A written stipulation or adjudicatory order was not submitted. A dispositional hearing was scheduled for January 26, 2009. (D.C. Doc. 20.) R.H.

moved to continue the dispositional hearing and the hearing was rescheduled for March 10, 2009. (D.C. Doc. 24.) On March 6, 2009, DPHHS filed a Petition to Terminate Parental Rights. (D.C. Doc. 26.) DPHHS also requested the district court make a finding that reasonable efforts were not required. Consistent with DPHHS' request, the district court vacated the March 10, 2009 dispositional hearing, and set a termination hearing for May 29, 2009. The district court ordered:

> Reasonable efforts to reunify are not possible due to the serious danger of continued abuse and neglect, and in part based on the adjudication of the prior abuse and neglect. No further efforts for reunification with respect to the parents and the youth are necessary or in the best interest of the youth pending a hearing on the petition in this matter.

(D.C. Doc. 27.) Neither parent was provided an opportunity to enter into, let alone, complete a treatment plan.

Following two continuances, the termination hearing was held on October 9, 2009 and November 5, 2009. T.H.'s maternal grandmother, M.G., recounted her observations and interaction with T.H. According to M.G., she provided occasional care to T.H. and never observed T.H. to be in any distress. (Term. Hrg. Tr. at 15.) Additionally, M.G. never observed any bruising on T.H. (Term. Hrg. Tr. at 17, 22.) According to M.G., she accompanied A.G. and T.H. to the emergency room on December 1, 2008. (Term. Hrg. Tr. at 11.) Upon arriving at

the hospital, M.G. observed T.H.'s right leg and did not notice any inflammation or swelling. (Term. Hrg. Tr. at 12.)

Dr. Mark Schulein testified to his care of T.H. at her newborn exam and subsequent well-child exams. (Term. Hrg. Tr. at 113.) Dr. Schulein noted R.H. accompanied T.H. to her well-child exams. (Term. Hrg. Tr. at 119.) R.H. asked Dr. Schulein questions during the exams and was concerned regarding his daughter's well-being. (Term. Hrg. Tr. at 127.) During the first well-child exam, Dr. Schulein observed T.H. was experiencing some jaundice that was resolving. (Term. Hrg. Tr. at 114.) Dr. Schulein examined T.H. again on September 26, 2008, and noted she was experiencing some eczema. (Term. Hrg. Tr. at 114.) During T.H.'s well-child examination on November 14, 2008, Dr. Schulein noted T.H.'s growth parameters were falling off the growth curve. (Term. Hrg. Tr. at 114.) Dr. Schulein was concerned with T.H.'s growth and advised the parents to return to get T.H. rechecked. Each well-child exam took approximately forty minutes, and Dr. Schulein would undress T.H., examine her from head to toe, and manipulate her arms and legs. (Term. Hrg. Tr. at 117-18.) Dr. Schulein did not note any expression of pain or discomfort when examining T.H. (Term. Hrg. Tr. at 117-18.) T.H.'s parents never made any reports to Dr. Schulein indicating T.H. was in any pain or discomfort. (Term. Hrg. Tr. at 116.) Dr. Schulein did not find T.H. to be particularly fussy during the exams. (Term. Hrg. Tr. at 118.) Dr.

Schulein never observed any bruising on T.H. (Term. Hrg. Tr. at 128.) Other than his concern regarding T.H.'s growth parameters, Dr. Schulein testified T.H. appeared to be a healthy baby. (Term. Hrg. Tr. at 125.) T.H. was on time for her well-child exams, and Dr. Schulein did not believe the parents were avoiding bringing T.H. in for her scheduled exams. (Term. Hrg. Tr. at 131.) Dr. Schulein opined he would have, in the course of conducting the well-child exams, discovered any recent injuries to T.H. (Term. Hrg. Tr. at 120.)

Pediatric Radiologist, Dr. Jeffrey Prince, testified to his interpretation of radiologic studies that were performed on T.H. (Term. Hrg. Tr. at 135.) Dr. Prince opined T.H. experienced different episodes of injury. (Term. Hrg. Tr. at 135.) Specifically, T.H. suffered injuries to her left clavicle, left-sided ribs, and right femur. (Term. Hrg. Tr. at 135-36.) Using T.H.'s December 1, 2009 radiologic studies as a reference point, Dr. Prince believed the rib injuries were approximately three weeks old, the clavicle injury to be approximately two to four weeks old, and that the femur injury was ten to fourteen days old. (Term. Hrg. Tr. at 136.)

Pediatrician Dr. Peggy O'Hara testified to her involvement in T.H.'s initial admission to the emergency room and subsequent care. (Term. Hrg. Tr. at 162.) Dr. O'Hara immediately ordered a skeletal survey after learning T.H. presented to the emergency room with a right femur fracture. (Term. Hrg. Tr. at 163.) Dr.

O'Hara initially encountered T.H. in an exam room with A.G. and M.G. (Term. Hrg. Tr. at 164.) According to Dr. O'Hara, A.G. became upset and very angry and belligerent when asked why she did not bring T.H. to the emergency room sooner. (Term. Hrg. Tr. at 165.) Dr. O'Hara observed A.G. seemed more concerned about herself and less worried about T.H. (Term. Hrg. Tr. at 168.) In fact, Dr. O'Hara specifically instructed the medical staff that A.G. was not permitted to be outside of the exam room with T.H. because Dr. O'Hara considered A.G. to be a flight risk. (Term. Hrg. Tr. at 279.) This order was directed at A.G. because Dr. O'Hara was concerned over A.G.'s erratic behavior in the emergency room, and concern A.G. might flee with T.H. (Term. Hrg. Tr. at 280.) R.H. was present at T.H.'s bedside for much of her course of treatment. (Term. Hrg. Tr. at 172, 263, 270.) Dr. O'Hara discharged T.H. to DPHHS on December 4, 2008. (Term. Hrg. Tr. at 174.) Dr. O'Hara considered the delay in seeking medical care of T.H. medical neglect. (Term. Hrg. Tr. at 183.) Finally, Dr. O'Hara opined, based upon her assessment of T.H., the skeletal survey, and negative collagen and laboratory profiles, that T.H. was abused. (Term. Hrg. Tr. at 184.)

Pediatrician Dr. Karen Mielke, an independent consultant in abuse and neglect cases, offered her opinion as to whether T.H. had been subjected to chronic abuse and medical neglect. (Term. Hrg. Tr. at 235.) Consistent with Dr. O'Hara's opinion, Dr. Mielke opined T.H.'s injuries were non-accidental and the delay in

seeking medical care constituted medical neglect. (Term. Hrg. Tr. at 235-36.) While Dr. Mielke considered T.H. a failure to thrive baby, she could not point to any records from Dr. Schulein indicating T.H. was a failure to thrive baby. (Term. Hrg. Tr. at 247-48.) Although Dr. Mielke was adamant T.H. had been a shaken baby, she could not identify any direct evidence demonstrating T.H. was a shaken baby. (Term. Hrg. Tr. at 250.)

Jacqui Poe, a child protection specialist with DPHHS, believed T.H. would be in danger of abuse and neglect if returned to her parents' care. (Term. Hrg. Tr. at 299.) Ms. Poe opined the parents did not meet T.H.'s medical needs because they delayed in seeking treatment. (Term. Hrg. Tr. at 300-01.) Ms. Poe further explained she could not formulate a treatment plan for the parents based upon their denials of wrongdoing in causing T.H.'s injuries. (Term. Hrg. Tr. at 303.) To that end, Ms. Poe did not offer any services to R.H., and did not require him to take any steps to address the issues that led to DPHHS' intervention. (Term. Hrg. Tr. at 307-08.) Ms. Poe observed subsequent supervised visits between R.H. and T.H. and testified R.H.'s demeanor was fine and he interacted well with his daughter. (Term. Hrg. Tr. at 70.)

R.H. testified that he works two jobs and averages sixty hours a week to support his family. (Term. Hrg. Tr. at 311.) R.H. was excited and thrilled when he learned he was going to be a father. (Term. Hrg. Tr. at 313.) R.H. immediately

called his friends and family with the good news and looked forward to T.H.'s birth. (Term. Hrg. Tr. at 314.) R.H. accompanied A.G. to her prenatal visits when his work schedule allowed. (Term. Hrg. Tr. at 315.) R.H. was present for T.H.'s birth and was one of the first people to hold his newborn daughter. (Term. Hrg. Tr. at 315-16.) R.H. testified he helped A.G. in caring for T.H., but that his primary role was supporting his family by keeping a roof over their head and putting food on the table. (Term. Hrg. Tr. at 317.) Following T.H.'s removal, R.H. attended parenting classes with A.G. (Term. Hrg. Tr. at 335.) The parents also looked into additional counseling but could not afford the cost. (Term. Hrg. Tr. at 335.) R.H. testified he would do anything and everything for his daughter, and denied causing T.H.'s injuries. (Term. Hrg. Tr. at 337-38.)

Pursuant to Mont. Code Ann. § 41-3-609(1)(d), the district court terminated R.H.'s parental rights to T.H.--finding by clear and convincing evidence that R.H. had subjected T.H. to aggravated circumstances as defined by § 41-3-423(2)(a). (D.C. Doc. 90.) In determining whether the conduct or condition of R.H. was likely to change within a reasonable time, the district court held the continuation of the parent-child relationship would likely result in continued abuse or neglect of T.H. based upon R.H.'s unwillingness to admit or accept responsibility for T.H.'s injuries, the severity and nature of the injuries, the age of T.H., and the failure of

R.H. to demonstrate any ability or willingness to consider the physical and mental well-being of his child. (D.C. Doc. 90.)

Accordingly, the district court terminated R.H.'s parental rights to T.H. and awarded Permanent Legal Custody to DPHHS with the right to consent to adoption. (D.C. Doc. 90.) The court entered its Order Terminating Parental Rights on February 2, 2010. (D.C. Doc. 90, attached.) It is from this Order that R.H. appeals.

STANDARD OF REVIEW

The Supreme Court reviews constitutional issues of due process as a question of law. Thus the Court's review is plenary. *In re A.R.*, 2004 MT 22, ¶ 8, 319 Mont. 340, 83 P.3d 1287.

This Court reviews a district court's decision to terminate parental rights to determine whether the court abused its discretion. *In re K.C.H.*, 2003 MT 125, ¶¶ 11-12, 316 Mont. 13, 68 P.3d 788; *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629. The test for an abuse of discretion is "whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." *In re K.J.B.*, ¶ 22.

A natural parent's right to care for and maintain custody of their child is a fundamental liberty interest that must be protected by fundamentally fair procedures. *In re K.J.B.*, ¶ 22 (citations omitted). Consequently, in termination

proceedings, the burden is on the party seeking termination to demonstrate by clear and convincing evidence that each requirement set forth in the statute has been satisfied. *In re K.J.B.*, ¶ 24; *In re A.C.*, 2001 MT 126, ¶ 20, 305 Mont. 404, 27 P.3d 960. Proceedings involving the termination of the parent-child relationship must meet due process requisites guaranteed by the Montana and United States Constitution. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408. Thus, "before terminating an individual's parental rights, a district court must adequately address each applicable statutory requirement." *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247.

Accordingly, a district court must make specific findings of fact and conclusions of law. This Court reviews a district court's findings of fact in a parental termination case to determine whether the findings in question are clearly erroneous. *In re A.C.*, ¶ 20; *In re K.C.H.*, ¶¶ 11-12. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if the district court made a mistake. *In re A.C.*, ¶ 20. The district court's conclusions of law are reviewed for correctness. *In re K.C.H.*, ¶¶ 11-12; *In re A.C.*, ¶ 20.

SUMMARY OF THE ARGUMENT

The district court failed to strictly follow the statutory requirements in terminating R.H.'s parental rights, thereby violating R.H.'s right to a fundamentally fair procedure. The district court violated R.H.'s due process rights by failing to hold an adjudicatory hearing that met the requirements of Mont. Code Ann. § 41-3-437, failing to issue a written order of adjudication, and in failing to hold a dispositional hearing. The district court's determination that reunification efforts were not necessary, without holding a hearing, is grounds for reversal. Finally, the findings upon which the district court terminated R.H.'s parental rights were insufficient and not supported by clear and convincing evidence.

ARGUMENT

I. THE DISTRICT COURT FAILED TO STRICTLY FOLLOW THE NECESSARY STATUTORY REQUIREMENTS.

A natural parent's right to care of a child is a fundamental liberty interest, which must be protected. *In re B.N.Y.*, 2006 MT 34, ¶ 16, 331 Mont. 145, 130 P.2d 594. As such, there must be fundamentally fair procedures to protect parents' constitutional liberty interest in parenting their child. *In re K.J.B.*, ¶ 41; *In re A.J.E.*, 2006 MT 41, ¶ 21, 331 Mont. 198, 130 P.3d 612. Strict compliance with the statutory requirement in child abuse and neglect proceedings is required and district courts must follow those requirements. *See In re K.J.B.*, ¶ 46 (*citing*

dissent *In re A.R.*, ¶ 23; *Inquiry into M.M.*, 274 Mont. 166, 174, 906 P.2d 675, 680 (1995)).

> "The termination of parental rights is a decision of paramount gravity, and the state must exercise extreme caution in terminating such rights .... Hence, **strict compliance** by the trial court with the appropriate standards for **termination** of a parent-child relationship is an absolute necessity .... A trial court must adequately address and resolve each specific requirement for **termination** .... Such detailed resolution of all issues essential to a decree of **termination** substantially lessens the risk that a parent-child relationship will be severed erroneously."

In Re R.B., 217 Mont. 99, 102, 703 P.2d 846, 848 (1985), quoting *People In Interest Of M.C.C.*, 641 P.2d 306, 308 (Colo.App.1982).

A. The District Court Did Not Issue an Adjudicatory Order in Accordance with Mont. Code Ann. § 41-3-437 and Failed to Hold a Dispositional Hearing.

A youth may be adjudicated if a court determines by a preponderance of the evidence that the child is a youth in need of care. Adjudication must determine the nature of abuse and neglect and establish the facts resulting in state intervention. Mont. Code Ann. § 41-3-437(2). The district court must make written findings identifying which allegations have been proved or admitted, whether there is a legal basis for continued involvement, and whether reasonable efforts were made to avoid removal. Mont. Code Ann. § 41-3-437(7). A dispositional hearing must be held within twenty days of the adjudicatory hearing, and must address issues separate and apart from the adjudication. Mont. Code Ann. § 41-3-438.

In the present case, the parties appeared on January 6, 2009, for a show cause hearing on DPHHS's petition for emergency removal and adjudication. At that hearing, R.H.'s counsel indicated R.H. would stipulate to T.H. being a youth in need of care. No testimony was given and there was not any other discussion regarding the facts to which R.H. agreed. The district court did not question R.H. on his understanding of the stipulation and the ramifications of his decision. Additionally, there was not any discussion regarding whether other reasonable efforts were necessary or available. Based upon the stipulation and its review of the reports filed with the court, the district court stated it would adjudicate and grant temporary legal custody. A written order was never issued by the district court as required by Mont. Code Ann. § 41-3-437(7).

The district court subsequently issued an order setting a dispositional hearing. Prior to the hearing, R.H. filed an unopposed motion to continue the hearing due to scheduling conflicts. (D.C. Doc. 23.) The district court continued the dispositional hearing until March 10, 2009, three months after the hearing in which R.H. orally agreed to adjudication. (D.C. Doc. 24.) R.H. was never offered a treatment plan, and DPHHS did not take any steps to foster reunification.

Before the March 10, 2009 dispositional hearing, DPHHS petitioned to terminate R.H.'s parental rights and requested the district court determine that reasonable efforts toward reunification were not necessary. (D.C. Doc. 26.)

Accordingly, the district court issued an order vacating the dispositional hearing and set a termination hearing. The district court also transferred temporary legal custody to DPHHS, finding reasonable efforts were not necessary. (D.C. Doc. 27.)

The failure of the district court to strictly follow the statutory requirements violated R.H.'s due process rights and deprived him of fundamentally fair procedures. The district court's failure to issue a written order for adjudication leaves this Court to speculate as to which facts or allegations were proven or admitted to by R.H. The district court's failure to issue a written order for adjudication also prevents this Court from identifying which facts or allegations led the district court to determine that reasonable efforts were not required.

This Court should also find the district court erred in failing to hold a dispositional hearing. While this Court has determined the failure to hold a dispositional hearing separate and apart from the adjudicatory hearing is not necessarily a violation of due process, *In re J.B. & B.B.*, 2006 MT 66, 331 Mont. 407, 133 P.3d 215, the district court's failure to hold a dispositional hearing in this case violated R.H.'s due process rights. In *J.B.*, the parents stipulated to adjudication, temporary legal custody and a treatment plan at the show cause hearing, thus eliminating the need for a dispositional hearing. This case is distinguishable from the circumstances presented in *J.B.* Here, R.H. stipulated to adjudication of T.H. as a youth in need of care, but did not expressly stipulate to

temporary legal custody. As noted above, the district court did not question R.H. on his understanding of the stipulation or the ramifications of his decision. The failure to hold a dispositional hearing placed R.H. in a position where he could not take any steps to preserve a relationship with his daughter or prevent the irretrievable destruction of his family life. DPHHS did not offer R.H. any services during this period, and did not take any steps toward formulating a treatment plan for R.H.

Without a dispositional hearing or court approved treatment plan, R.H. could not address the alleged issues that resulted in DPHHS' intervention and subsequent removal of T.H. As such, R.H. was unable to demonstrate good cause existed to make reasonable efforts towards reunification. In sum, R.H. was unable to rebut DPHHS' request that reasonable efforts not be made. The procedure was fundamentally flawed from this point forward.

B. The District Court Was Required to Hold a Hearing on DPHHS' Request for a Finding Reunification Efforts Were Not Necessary.

A district court may make a finding DPHHS need not make reasonable efforts to provide preservation or reunification efforts if the court determines the parent has subjected the child to aggravated circumstances. A finding preservation or reunification services are not necessary must be supported by clear and convincing evidence. Mont. Code Ann. § 41-3-423(2), (4).

> Clear and convincing evidence is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of the proof. This requirement does not call for unanswerable or conclusive evidence.
>
> The quantity of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

In re E.K., 2001 MT 279, ¶ 32, 307 Mont. 328, 37 P.3d 690.

The district court issued an order on March 9, 2009, stating reasonable efforts were not required. The only information the district court could have relied upon in finding reasonable efforts were not required were the petitions filed by DPPHS and the reports attached by the child protection worker. Such documents are insufficient to support such an important finding. "Statements supporting an initiating petition simply are not evidence upon which a trial court can rely in making findings of fact." *In re D.A.*, 2003 MT 109, ¶ 38, 315 Mont. 340, 68 P.3d 735 (dissenting opinion).

The determination reasonable efforts are not required is a crucial procedural event in a youth in need of care case. Such a finding must be supported by clear and convincing evidence. At the time the district court made its determination, the record was void of any testimony or evidence to support a finding that reasonable efforts were not required. R.H. was not given the opportunity to present evidence to rebut DPHHS' request. The lack of clear and convincing evidence, and R.H.'s

inability to provide evidence to rebut DPHHS' request, violated his due process rights. As such, the procedure resulting in the termination of R.H.'s parental rights cannot be said to be fundamentally fair. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have lost temporary custody of their child to the State.

The determination that reasonable efforts were not required also undermined R.H.'s ability to overcome DPHHS' petition to terminate his parental rights. While R.H. voluntarily enrolled in parenting classes, he was unable to avail himself of additional services without financial assistance from DPHHS. Without the assistance of additional counseling and services, R.H. was unable to demonstrate he was capable of addressing and resolving the issues that led to the removal of his daughter. The failure to provide services to R.H., without a hearing, was fundamentally unfair. R.H., faced with the forced dissolution his parental rights, deserved the protection of fundamentally fair procedures.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING R.H.'S PARENTAL RIGHTS.

The district court relied upon Mont. Code Ann. § 41-3-609(1)(d) in terminating R.H.'s parental rights. Section 41-3-609(1)(d) provides that termination may be ordered if clear and convincing evidence exists the parent has subjected the child to any of the circumstances under § 41-3-423(2)(a) through (e). The district court also relied upon Mont. Code Ann. § 41-3-609(1)(f), which

requires a finding that an appropriate court ordered treatment plan has not been successfully complied with and the condition of the parents rendering them unfit is unlikely to change.

In this case, a treatment plan was never ever offered or approved. Therefore, Mont. Code Ann. § 41-3-609(1)(f) is applicable. The district court held:

> The repeated injuries and bone fracture of T.H. during her first four and one-half months of life, the severe pain that T.H. endured from these injuries, the failure of the Mother and Father to timely seek medical attention for the injuries, and subjecting T.H. to a failure to thrive environment are aggravated circumstances which constitute chronic abuse and chronic severe neglect of T.H. on the part of Mother and Father.

(D.C. Doc. 90.)

Findings of fact are clearly erroneous if they are not support by substantial evidence. Additionally, findings of fact are clearly erroneous if the district court misapprehended the effect of the evidence, or, even if substantial evidence exists and the effect of the evidence has not been misapprehended, if this Court is left with a definite and firm conviction that the district court made a mistake. *In re Custody & Parental Rights of M.W.*, 2001 MT 78, ¶ 3, 305 Mont. 80, 23 P.3d 206.

The evidence presented at the termination hearing to support a finding of medical neglect and failure to thrive was less than clear and convincing. Even if this Court finds there was sufficient evidence supporting these findings, there was

not clear and convincing evidence supporting a determination R.H.'s actions or inactions constituted aggravated circumstances of chronic abuse and neglect.

T.H. suffered bone fractures of varying ages, and the injuries were serious. However, R.H. disputes the findings he caused T.H.'s injuries, or that he should have recognized the injuries and sought medical care earlier. As noted above, T.H. attended well-child exams on July 25, 2009, September 26, 2009 and November 14, 2009. At each well-child exam, Dr. Schulein found T.H. to be well taken care of and a never observed any bruising. (Term. Hrg. Tr. at 128.) Additionally, Dr. Schulein did not observe any expression of discomfort or pain when examining T.H. (Term. Hrg. Tr. at 117-18.) Dr. Schulein saw T.H. consistently from birth until her removal by DPHHS. Dr. Schulein did not express any significant concerns regarding T.H.'s development or R.H.'s parenting. The district court ignored Dr. Schulein's testimony that, with the exception of T.H.'s growth parameters, she appeared to be happy, healthy and not in distress. Dr. Schulein was the one medical provider who had examined T.H. regularly prior to her admission to the emergency room.

Nevertheless, the district court concluded R.H. delayed in seeking medical care for T.H. because he sought to hide her injuries. There was no direct evidence R.H. was the cause of T.H.'s injuries. Additionally, there was not any direct evidence that R.H. attempted to hide information regarding T.H.'s injuries. There

was not any evidence R.H. prevented T.H. from attending her well-child exams, or that he discouraged A.G. from taking T.H. to the emergency room. The opinions R.H. harmed or purposely did not disclose T.H.'s injuries were based upon speculation and conjecture.

R.H. did not delay in seeking medical care for T.H. R.H. testified that, and A.G. confirmed, T.H. was not overly fussy in the days leading to her admission to the emergency room and they had no reason to believe she was in significant pain. As such, any alleged delay in seeking medical care for T.H. was reasonable.

This Court can determine the findings are clearly erroneous where it is left with the definite and firm conviction the district court made a mistake. The district court erred in this case because it was not proven by clear and convincing evidence R.H. caused injury or intentionally withheld medical treatment for T.H. In light of the lack of evidence proving R.H. was responsible for T.H.'s injuries or knowingly withheld treatment, the district court made a mistake and this Court should find its findings are clearly erroneous.

CONCLUSION

For all the reasons discussed above, the district court erred when it terminated the parental rights of R.H. to his daughter T.H. Accordingly, its Order of Termination must be reversed.

Respectfully submitted this 5th day of May, 2010.

JOSEPH P. HOWARD, P.C.

By: _____
for Joseph P. Howard

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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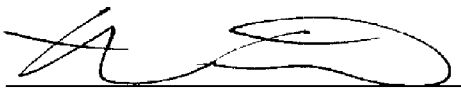
DATED: 5/5/10 

CERTIFICATE OF COMPLIANCE

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for JOSEPH P. HOWARD